IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMPANY APPLICATION NO.123 OF 2004
IN
COMPANY PETITION NO.76 OF 2004
CONNECTED WITH
COMPANY APPLICATION NO.562 OF 2003

Jindal Iron and Steel Company Ltd.
(JISCO) a company incorporated
under the Companies Act, 1956
having its Registered Office
at Jindal Mansion,
5A, Dr. G.Deshmukh, Mumbai-
400 026. ...Applicant.

And

Assistant Commissioner of
Income Tax 5(2), Mumbai
having office at Aayakar
Bhavan, M.K. Road,
Mumbai - 400 020. ...Intervenor

Mr. Iqbal Chagla with Mr. Janak Dewarkadas, Mr. D. Khambata, Mr. Virag Tulzapurkar, Mr. Jagangir D. Mistri, Mr. Sanjay Irani i/b M/s. Rajani Associates, Advocate for the applicant.

Mr. B.Chaterjee i/b T.C. Kaushik for the Intervenor in support.

CORAM: V.M. KANADE, J.
DATE : 2nd September, 2004.

ORAL ORDER:

1. This Company Application is taken out on behalf of the Income-tax Department through the Assistant Commissioner of Income Tax whereby they are seeking intervention in the main Company Petition No.76 of 2004 and connected Company Application No.562 of 2003 and after the applicant is allowed to intervene in the said petition, they are seeking a direction to the applicant in the said Company Application No. 562 of

2003 to furnish a copy of the application. The applicants also oppose the approval of the scheme. The said application is accompanied by an affidavit of the Assistant Commissioner of Income-tax.

2. I have heard the learned Counsel for the interveners and the learned Counsel appearing on behalf of the Company at length. The principal objection of the Income-tax Department is that the Income-tax Department has a right to intervene in the scheme of amalgamation and to oppose the said scheme. In support of the said submission, the learned Counsel appearing on behalf of the Income-tax Department has relied upon the judgment of the Gujarat High Court as also the judgments of the Apex Court and has further stated that by virtue of the order passed by this Court on 5th and 7th July 2004, this Company Court has accepted the Income-tax Department as a creditor along with Balli Kloeckner. The second submission of the learned Counsel appearing on behalf of the interveners is that if the scheme of arragnement and amalgamation is approved, it would have an adverse impact on the tax liabilities of M/s. Jindal Iron and Steel Company Ltd (hereinafter referred to for the sake of brevity as "M/s. JISCO") for the current year as also for the future years. It is further submitted that if the

scheme is approved, it will have serious effect on the revenue of the Union and the very purpose of notice of demand under section 156 of of the Income Tax Act, 1961 for payment of advance tax under section 210(3), 210(4) read with section 210(5) vide From No.28 would be defeated. It is further submitted that M/s JISCO had advertised its financial results for a period of 9 months ending on 31/12/2003 and, according to the said results, the estimated income of the Company during the current Financial Year 2003-2004 is Rs 162 crores and, therefore, its estimated current tax liability would be Rs 50.85 crores which was required to be paid on/or before 15/12/2003. It is submitted that pursuant to the advertisement, order dated 29/1/2004 under section 210 has been passed demanding Rs 50.85 crores on the estimated income of Rs 162 crores at the time of advance tax installment due on 15/3/2004. It is submitted that reply was filed by the Company stating that the scheme of arragnement and amalgamation had been filed in the High Court, Bombay and Karnataka High Court and consequent to the merger, M/s JISCO would be dissolved without winding up and merged with the entity M/s Jindal Vijaynagar Steel Ltd. (For short "M/s. JVSL"). The Income-tax Department also relied upon the statement of the carried forward loss and depreciation signed by Shri

Sheshadri Rao, Director Fiance of M/s JVSL. It is submitted that, therefore, it will seriously affect the revenue of the Union. Shri Chatterjee, the learned Counsel appearing on behalf of the Income-tax Department, relied upon the judgment of the Apex Court in the case of **Commissioner of Sales Tax Vs. Modi Sugar Mills Ltd. reported in AIR 1961 SC page 1047** in which in para 11 the Apex Court has held that while interpreting the taxing statute, equitable considerations are entirely out of place and that the taxing statute should not be interpreted on any presumptions or assumptions. He further relied upon para 13 of the said Judgment wherein it is held that the Court cannot resort to fiction which is not prescribed by the legislature and seek to effectuate that alteration by devising machinery not found in the statute. He also relied upon the Judgment of the Gujarat High Court in the case of **Wood Polymer Limited, In re. and Bengal Hotels Pvt. Ltd., In re., reported in 109 ITR 177** wherein the Gujarat High Court has observed that it was the duty of the Court to lift the corporate veil and find out what is the intention of the Company and if it is noticed that the intention is to evade the tax then the Company Court has a right to strike down such a scheme which would be in the public interest and for evasion of government dues.

He also relied upon the Judgment of the Delhi High Court in the case of **Mohan Exports India Ltd., In re. reported in 95 Company Cases, page 53** in support of his submission that the Court, while exercising its jurisdiction under sections 391 and 394 of the Companies Act can reject the scheme which has been filed with an ulterior motive of tax evasion. He further relied upon the Judgment of the Apex Court in the case of **Miheer H. Mafatlal vs. Mafatlal Industries Ltd. reported in 87 Company Cases, page 792** and submitted that the Apex Court had categorically stated that in the case of tax fraud the Court may reject the merger or amalgamation.

3. The learned Counsel appearing on behalf of the Income-tax Department further submitted that the petitioners were not entitled to the benefit under section 72-A of the Income-tax Act and that, for the first time, in 1989, the Company had shown taxable profit and tax liability with reference to News-paper Advertisement. He further relied upon the report submitted by M/s. Kalyaniwala Mistri, Chartered Accountant which, according to the learned Counsel appearing on behalf of the Interveners, held that if the proposed scheme is allowed there is danger of bankruptcy of the Company. The learned Counsel

further relied upon the judgment of the Apex Court in the case of **Marshall Sons and Co. (India) Ltd. Vs. Income Tax Officer, reported in 223 ITR 809** and submitted that the date of the merger should be allowed from 1/4/2004 and not from 1/4/2003 as the Company would claim set off for the Financial Year and seek refund of whatever tax they had paid. Shri Chatterjee, the learned Counsel appearing on behalf of the Income-tax Department further submitted that the judgment of the Bombay High Court in the case of **S.E.B.I. Vs. Sterlite Industries (India) Ltd. reported in 113 Company Cases 273** cited by the petitioners is not applicable to the facts of this case as, S.E.B.I., according to the learned Counsel, is not a regulatory body and not a creditor.

4. The learned Counsel appearing on behalf of the petitioners - Company submitted that the Income-tax Department had no right to intervene in the matter as the Central Government had given its no objection for the sanction of the scheme and the Income-tax Department being a part of the Central Government, had no right to independently make an application for intervening in the said scheme of amalgamation. He relied upon the Judgment of the Division Bench of this Court in the case of **S.E.B.I. Vs. Sterlite**

Industries (India) Ltd. reported in 113 Company Cases 273. He further pointed out that the report submitted by the Chartered Accountant has stated that the amalgamated Company had sufficient assets. He further submitted that the Court had directed the Chartered Accountant to submit a report taking into consideration the claim made by the Objecting Creditor - Balli Kloechner GmbH to the tune of Rs 133 crores and in respect of the Income-tax Department which was to the tune of Rs 63 crores. He submitted that considering the fact that the Objecting Creditor - Balli Kloechner GmbH was taken care of by virtue of the Bank Guarantee which was given which would secure the alleged claim in the event the said Creditor succeeded in the Arbitration Proceedings, the report which was submitted by the Chartered Accountant, therefore, had to be considered in the said perspective.

5. In my view, the submissions made by Shri Chatterjee, the learned Counsel appearing on behalf of the Income-tax Department cannot be accepted. As far as the reliance placed by the learned Counsel on the judgment of the Apex Court in the case of Modi Sugar Mills Ltd. (supra) is concerned, there cannot be any dispute regarding the ratio laid down in the said

Judgment. It is well settled law that so far as taxing statutes are concerned, they are to be construed strictly and this ratio has been laid down in catena of cases. Similarly, reliance is placed on the said judgment for the proposition that the Court cannot interprete the taxing statutes on any presumptions or assumptions or devise machinery to alter the statute which also cannot be disputed. Though this Court repeatedly asked the learned Counsel appearing on behalf of the Income-tax to point out whether there is any statutory bar in the Income-tax Act or any other taxing statute which prohibited the scheme of amalgamation or merger, he was not in a position to point out any such provision except section 72-A of the Income-tax Act. Reliance was placed on the said provision and my attention was drawn to the various conditions which are imposed under section 72-A. Without going into the question whether section 72-A would be applicable to the facts of the present case, even from the perusal of the said section, there is nothing to indicate that on non-observation of the said conditions would operate as a bar in granting sanction to the scheme of amalgamation.

6. Shri Chatterjee, the learned Counsel appearing on

behalf of the Income-tax Department has placed reliance upon the judgment of the Gujarat High Court in the case of **Wood Polymer Limited, In re. and Bengal Hotels Pvt. Ltd., In re., reported in 109 ITR 177** which has been delivered by D.A. Desai J. (as he then was). In my view, the ratio of the said judgment would not be applicable to the facts of the present case. In the said case, the Court has observed that principal object of the scheme of amalgamation was evasion of capital gains tax and that, as a result, there was violation of section 45(1) of the Income Tax Act. The Court, after having come to the said conclusion, has observed that the court could lift the corporate veil in such cases and reject any such scheme which had principal object of evading capital gains tax. In my view, ratio of the said Judgment would not be applicable to the facts of the present case as, in the said case, the Court had come to the conclusion that the sole purpose of the scheme was to evade the tax. The Court, in that case, has observed as under:-

> "As the transfer of capital asset is being brought about as an integral part of the scheme of amalgamation of amalgamating company with the

> amalgamated company and the amalgamated company is an Indian company, transfer of the capital asset, namely, Avenue House, would again be exempt from the liability to pay capital gains tax."

Therefore, in my view, the ratio of the said judgment cannot be made applicable to the facts of the present case as, to my mind, there is no violation of any provisions of any taxing statute.

7. So far as the objection to the date of amalgamation is concerned, the contention of the Income-tax Department that the scheme should not be sanctioned from 1/4/2003 and the reliance placed by the learned Counsel on the judgment of the Apex Court in the case of Marshall Sons and Co. (India) Ltd. (Supra) also, in my view, will not be of any assistance to the Revenue Department. The Apex Court in the concluding paragraph of the said judgment has observed as under:-

> "For the above reasons, the appeals are accordingly allowed. The writ petitions filed by the appellant in the High Court shall be deemed to have been allowed. We, however, make it clear that we have

> not expressed any opinion on the plea of learned counsel for the Revenue that the amalgamation itself is a device designed to evade the taxes legitimately payable by the subsidiary company. If the income-tax authorities think that they are entitled to raise this question in the proceedings under the Income-tax Act, it is open to them to do so by way of a separate proceeding according to law."

Thus, the Income-tax authorities are always entitled to raise this question in the proceedings under the Income-tax Act and it is open for them to do so by way of separate proceedings according to law.

8. The Apex Court in the case of Miheer H. Mafatlal Vs. Mafatlal Industries Ltd. reported in 87 Company Cases 792 has extensively considered the scope of sections 391 to 394 of the Companies after considering the earlier decided cases and has summarised as follows:-

> . "In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the company court

has clearly got earmarked. The following broad contours of such jurisdiction have emerged :

. (1) The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by section 391(1)(a) have been held.

. (2) That the scheme put up for sanction of the court is backed up by the requisite majority vote as required by section 391(2).

. (3) That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

. (4) That all necessary material indicated by section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by section 391(1).

. (5) That all the requisite material contemplated by the proviso to sub-section (2) of section 391 of the Act is placed before the court by the concerned applicant seeking sanction for such a scheme and the court gets satisfied about the same.

. (6) That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

. (7) That the company court has also to satisfy itself that member or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

. (8) That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

. (9) Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the court are found to have been met, the court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the court

there could be a better scheme for the company and its members or creditors for whom the scheme is framed. The court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

. The aforesaid parameters of the scope and ambit of the jurisdiction of the company court which is called upon to sanction a scheme of compromise and arragnement are not exhaustive but only broadly illustrative of the contours of the court's jurisdiction."

The law regarding amalgamation of Company is, therefore, well settled and the scope and ambit of the power which is to be exercised by the Court also is well defined. Commercial decisions which are taken by the corporate entities which are for the benefits of its shareholders, creditors etc have to be supervised/monitered by the Court within the frame work as laid down in the case of Mafatlal cited hereinabove. The Court is not supposed to make a

fishing and roving inquiry and stall the amalgamation proceedings in the process merely on an apprehension of tax evasion. In my view, objections raised by the Income-tax Department are clearly unfounded and tax liability, if any, can be taken care of by the amalgamated Company which is evident from the report of the Chartered Accountant which has been submitted to this Court and if the said report is read as a whole in its entirety, I have no manner of doubt that such a liability, if any, can be taken care of by the amalgamated Company. In any event, the Chartered Accountant has observed that even if the Company goes into liquidation, the net assets of the Company far exceed the liabilities, if any, of the Company. The Division Bench of this Court in the case of **S.E.B.I. vs. Sterlite Industries (India) Ltd. reported in 113 Company Cases 273** has, after considering the scope and ambit of section 391 has held that the S.E.B.I. has no right to be heard in the petition for sanction of the scheme. The ratio laid down in the said case, in my view, is squarely applicable to the facts of the present case. The submission of the learned Counsel appearing on behalf of the Income-tax Department that S.E.B.I. is not a creditor and, therefore, the said judgment is not applicable to the Income-tax Department, cannot be accepted.

9. In the result, Company Application is dismissed.

10. Copy of this order duly authenticated by the Company Registrar of this Court be supplied to the parties.

V.M. KANADE, J.